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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JACK WASSERMAN,
Attorney for Respondent,
Warner Building,
Washington 4, D. C.

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Opinion Below

The opinion of the Court of Appeals (Pet. App. 1a-21a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 7, 19[illegible]. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented

In *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) this Court held that under applicable regulations (8 C.F.R. 90.3, 90.12) prejudgment and interference with the discretion of the Board of Immigration Appeals by the Attorney General rendered a deportation order void, and a habeas corpus petition alleging such interference stated a cause of action. Thereafter the District Court found that the documentary and other proofs adduced herein did not sustain the allegations of prejudgment and dictation. The Circuit Court reversed upon the ground that the District Court's findings were clearly erroneous.

The question presented here is whether further review by this Court is appropriate to weigh the force and effect of the documentary and other proofs herein.

Statutes and Regulations Involved

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U.S.C. 155 (c)], as amended provides in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States

for seven years or more and is residing in the United States upon the effective date of this Act."

8 C.F.R. 90.3 (1949 Ed.) provides in part:

" . . . appeals shall lie to the Board of Immigration Appeals where orders, whatever their nature . . . arise in: . . . (2) Deportation proceedings . . . "

8 C.F.R. 90.12 (1949 Ed.) provides in part:

"The Board of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him;

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision;

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees."

Statement

Respondent, Joseph Accardi, has been ordered deported on the ground that he entered the United States in 1932 without a visa (R. 2a, Par. 4). The Immigration file of respondent reveals that the only adverse factors in his record were two arrests in 1933 and 1934 which did not result in convictions and a 1940 suspended sentence for violation of 18 U.S.C. 88. The allegation of respondent's good moral character for the past ten years (R. 3a, Par. 7) is not only unopposed, but is corroborated by a favorable finding in the Decision of the Board of Immigration Appeals, dated April 3, 1953 (R. 183a, 184a). Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise dis-

cretion to permit respondent to remain in the United States as a permanent resident (R. 2a, Par. 4). The instant application for habeas corpus alleges:

(1) That the Attorney General maintains a confidential file relative to respondent, that the Government has included his name on a secret purge list, and that because of confidential information and other matters outside the record, including the proscribed listing of his name by the Attorney General on October 2, 1952, respondent was ordered deported in 1953 (R. 3a, 4a, Par. 11-16).

(2) That the Attorney General decided to deport respondent in October of 1952, and, accordingly, the case was prejudged in advance of the Board's decision of April 3, 1953 and that respondent was denied fair consideration of his case (R. 5a, Par. 19). This Court held that these allegations state a cause of action (347 U.S. 260).

The Government in its return to the writ herein admitted that Accardi was included within the special program of the Attorney General (R. 15a, Par. 12 and R. 45a).

It contended, however, in its return (R. 15a, 16a, Par. 12-14), in sworn oral testimony of the Chairman of the Board of Immigration Appeals (R. 105a), and in affidavits filed herein and responses to interrogatories (R. 24a, 46a) that the Attorney General's program was one to expedite cases rather than to deport. It was asserted that the program was one

> "intended to prevent unnecessary delays occasioned or tolerated through negligence or indifference of officials charged with the responsibility of carrying out enforcement measures provided for by statute," (R. 24a).

It was also claimed that the Board was not aware that Accardi was within the Attorney General's program at the

time of its decision (R. 55a), and accordingly that it could not have been influenced by it.

The matter came on for hearing upon the writ before Judge McGohey on June 23, 1954. Documentary evidence and depositions of six witnesses were received in evidence. Only one witness testified orally (R. 102a). Judge McGohey rejected the Government's contention that the Board was not aware that Accardi was within the program at the time of its decision (R. 189a, Finding 5). He did, however, rule that notification that Accardi was within the program was merely a request to expedite and, therefore, that Accardi had a fair hearing before the Board (R. 189a, Finding 3).

The Court of Appeals recognized that this Court had held in its previous decision that:

> " . . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' "

It further observed that in addition to the public announcement, Attorney General McGranery's testimony (R. 136a *et seq.*) "amply supports the Supreme Court's interpretation" (Pet. App. 5a). Whether the program was one to expedite cases or to deport was the core of the dispute in the Courts below. The majority of the Court of Appeals held, upon the basis of the documentary evidence and the Attorney General's testimony that the District Court's ruling adverse to respondent was clearly erroneous (Pet. App. 13a). The dissenting opinion concluded that it was not (Pet. App. 21a).

Argument

The essence of the controversy herein is an issue of fact, i.e., whether the Attorney General's Program was one to

deport or merely to expedite cases as found by the District Court (R. 189a). If it was one to deport and the Board was aware of the program and that Accardi was included therein as found by the District Court (R. 189a, Finding 5), then prejudgment and interference with the Board's discretion were established. The Government's denial of prejudgment rested on three defenses: (1) That the program was one merely to expedite; (2) That the Board was not aware that Accardi was within the program; (This defense may not be raised here since the District Court ruled adversely to petitioner's contention and no cross-appeal was taken.) (3) That since the program was one merely to expedite, *ex parte* knowledge that Accardi was within the program—although admittedly an unfavorable factor—did not influence the Board's judgment.

The undisputed contemporaneous documentary evidence established a program of the Attorney General to deport rather than to expedite cases. The Board was aware of the contemporaneous expressions by the Attorney General of his program (R. 104a-106a) and was aware that Accardi was within the program. It was also established by documentary proof that Accardi was ordered deported pursuant to the program (R. 149a). This evidence, certainly created a prima facie case of prejudgment and bias, not overcome by self-serving statements that the Board's judgment was untrammeled because they interpreted the program, contrary to contemporaneous documentary proofs, Mr. McGranery's testimony, and this Court's prior decision herein, as one to expedite cases rather than to deport. Since there was a program to deport, and the Board was aware of Accardi's inclusion therein, a strong presumption existed that the Board followed the views of its superior, the Attorney General. This presumption was not overcome by any evidence in the record. This Court previously noted that a direct order from the Attorney

General to the Board was neither alleged nor to be proved for it "would be naive to expect such a heavy handed way of doing things." 347 U.S. at 267.

The decision below properly interpreted this Court's opinion. It finds adequate documentary and compelling support in the record and is the result of the application of proper standards of review.

(A) *The Attorney General's Program*

In its return (R. 15a, 16a, Par. 12, Par. 14) and in the affidavit of Mr. Friedman of May 10, 1954 (R. 22a), it was alleged that the Attorney General announced a program on October 2, 1952, designed to expedite cases because of the "accumulation of arrearages in much of the operation of the Service" (R. 21a). Response to interrogatory 13 asserts that the program of the "Attorney General is not a program to deport, but a program to expedite the consideration of deportability and that such cases were expedited in the same manner as other cases which merited priority" (R. 46a).

Exhibit 2 herein (R. 146a) contains contemporaneous press releases which were before the Supreme Court in its prior consideration of the case. The press release of Attorney General McGranery of October 2, 1952 (R. 148a), announced that "appropriate action will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense," and that "the execution of this plan will do much to destroy the roots of organized crime in America." The press release of April 3, 1953 (R. 149a), announced, through Attorney General Brownell, that Joseph Accardi, known as a New Jersey racketeer, was ordered deported "*under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives.*"

On the basis of these documents, this Court observed:

> " . . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport." 347 U.S. at 267.

This analysis of the press releases by this Court constitutes the law of the case. *White* v. *Higgins*, 116 F. 2d 312 (C.A. 1, 1940); 65 *Harvard Law Review* 822 (1952); 5 *Stanford Law Review* 751 (1953) and is *res judicata*. *United States* v. *Moser*, 266 U.S. 236, 242 (1924).

But, what is more important, the additional documentary proofs and testimony herein, doubly reinforce this Court's conclusion.

Mr. McGranery testified that his program was not as the Government contends born as a result of an accumulation of arrearages, but on the contrary that it was conceived because "political organizations, particularly in the large metropolitan areas, were in some cases dominated by racketeers" (R. 136a), and that it was as announced in a press release of December 8, 1952 (Exhibit 7, R. 166a), a program aimed at deporting and "ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136a). He further testified that while the Accardi case was on appeal before the Board of Immigration Appeals, he concluded that Accardi was a racketeer and he "*moved to deport him*" by placing him within the program (R. 141a). Mr. Horan, another witness, places this date at either November 19 or 20, 1952 (R. 79a).

William Sexton, who formerly represented the Government in this litigation admitted in open Court that Accardi was on the "Attorney General's proscribed list of alien deportees." Response to Interrogatory No. 9 (R. 45a, 347 U.S. 267).

Mr. McGranery identified the newspaper accounts (Exhibits 4, 5 and 6) as accurately reflecting his program (R. 135a). Mr. Finucane, Chairman of the Board of Immigration Appeals, testified (R. 104a) that he first learned of Mr. McGranery's program by reading the Washington Post and Evening Star (Exhibits 4 and 5). Exhibit 4 is headlined "U S. Plans to Deport 100 Alien Racketeers."

Exhibit 5 (R. 163a) reads:

> "The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld and other unsavory reputations is no sudden face-saving device for the Democratic Administration according to Attorney General McGranery."

Exhibit 6 (R. 165a), the New York Times, likewise repeats that "McGranery starts a drive to deport Alien Racketeers * * * 100 gangsters involved." These exhibits name some six or seven specific individuals who were included within the program. Exhibits 7 and 7A (R. 166a, 167a) were press releases, issued in December 1952, before the Board's decision herein and received by the Board. They confirm that the program was a "deportation drive." Exhibits 7B and 7C (R. 168a, 169a), as well as Exhibit 2 (R. 150a), verify that Attorney General Brownell continued the program of his predecessor. The answer to Interrogatory 21 admits that the program was continued under Attorney General Brownell (R. 47a).

The Annual Report of the Commissioner of Immigration for the fiscal year ending June 30, 1953 (R. 171a), describes the program as

> "the Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demon-

strated that their presence is inimical to the United States."

No one who reads and analyzes the foregoing can find any language which justifies the belief that the Attorney General was concerned solely and merely with expedition or the removal of a back-log. As this Court declared, and as Mr. McGranery admitted with reference to Joseph Accardi, those within the program "were persons whom the Attorney General planned to deport," 347 U.S. at 267.

(B) *Petitioner's Case Was Not Unchallenged.*

Petitioner contends herein that its case in the Courts below presented unchallenged evidence that the Board of Immigration Appeals was not influenced by the Attorney General's program to "expedite cases" (Pet. 10). This is not true. The Government's case presented by interested witnesses, was not only challenged, but thoroughly discredited. Their interpretation as to the Attorney General's program, as we have shown above in paragraph A herein, was not only contradicted by Mr. McGranery but also by contemporaneous documentary evidence. In the instant case six witnesses testified through depositions. Only one witness testified orally. The balance of the case was documentary. Where documentary evidence, including depositions, is submitted, the Court of Appeals is "as well able as the trial judge to appraise credibility of the witnesses and draw inferences from their testimony" *Luckenbach* v. *United States*, 157 F. 2d 250, 251 (C.A. 2, 1946). See also: *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947); *The Coastwise Transp. Corp.* v. *Charles Nelson Co.*, 68 F. 2d 720 (C.A. 2, 1934); *Norment et al.* v. *Stilwell*, 135 F. 2d 132 (C.A. 2, 1943); *Equitable Life Assurance Co.* v. *Irelan*, 123 F. 2d 462, 464 (C.A. 9, 1941); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606 (C.A. 2, 1942); and

Bowles v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C.A. 10, 1944).

In the instant case the only oral testimony presented was that of Mr. Finucane (R. 102a), an infinitesimal part of the case. The District Court found that the Board was aware that Accardi had been included within the Attorney General's program (R. 189a, Finding 5), contrary to the testimony of Mr. Finucane (R. 127a). This finding can not be challenged in this Court as petitioner seeks to do. Mr. Finucane twice asserted that he interrogated the Board Members and that no Board Member had any recollection that Accardi was within the program (R. 110a, 128a). Board Member Ludwig, however, distinctly remembered that he was aware of Accardi's inclusion within the Attorney General's program (R. 69a). And, Mr. Finucane testified that the Attorney General's program was not one to deport racketeers (R. 111a) contrary to the deposition of Mr. McGranery (R. 135a, 136a), press releases (R. 166a), and newspaper accounts identified by Mr. McGranery as accurate (R. 135a). Mr. Finucane admitted that these newspaper accounts and press releases were received and read by him (R. 104a), and that they were the sole source of knowledge of the program prior to April 3, 1953 (R. 106a). A man is presumed to know what a reasonable person ought to know from facts brought to his attention. *Avery* v *Commissioner of Internal Revenue*, 22 F. 2d 6, 7 (C.A. 7, 1927). Having read the press releases and newspaper accounts, Mr. Finucane "was under obligation to contradict the impression they must have created." *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947). Nowhere did Mr. Finucane or any other government witness explain the basis for the impression that the program was one to expedite rather than deport—an impression which no one could gather from the contemporaneous announcements of Mr. McGranery. These announcements must be understood to convey the language

utilized in their ordinary and popular sense. The documentary proof herein of the program, if inconsistent—as it was—with the oral testimony of Mr. Finucane—must be given controlling weight. *Sachs* v. *Ohio Nat. Life Ins. Co.*, 148 F. 2d 128 (C.A. 7, 1945), cert. denied 326 U.S. 753; *Symington Co.* v. *National Malleable Casting Co.*, 250 U.S. 383 (1919). Where oral testimony "is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947).

It is clear, therefore, that the Attorney General did—just what the petition alleges and this Court denied him the right to do. He prejudged the case. Why? Mr. McGranery, notwithstanding the regulations, believed, of course in perfectly good faith—that he had the right to do it. For in his deposition he states (R. 142a):

> "Frankly, I can't get your point. I don't see what you are driving at. The Immigration Board of Appeals is the Attorney General."

When Mr. McGranery placed Accardi within his program, he did so to deport him as his testimony reveals (R. 141a). Notice of this fact was communicated to the Board while the case was spending before the Board (R. 189a, Finding 5). There was then, in 1952, no basis whatsoever for the Board to conclude that it was mere expedition that the Attorney General desired and, in fact, the Board did not expedite the case—on the contrary, decision in the case was delayed from November 1952 when Accardi was listed within the program until April 1953 when the case was decided.

Moreover, the Board was notified that an alien was within the program *ex parte* and without notice to the other side.

The notification was confidential. It did not request expedition but merely advised the Board that a person was within the Attorney General's program (R. 110a). The express language of the notification was, therefore, a communication that a person was included within the class of unsavory characters or racketeers whom the Attorney General desired deported. The Government admits, as it must, that no alien with a clear record, was the object of the program (R. 50a).

In the light of these considerations, both the majority and concurring opinions in the Court of Appeals properly found that the Board's self-serving denial that its judgment was influenced could not be accepted.

(C) *Relationship of instant case to Marcello and other cases*

We oppose the grant of certiorari in the instant case. We have, however, as reflected in the Government's petition consented to argue the instant case during this term if certiorari is granted and the Court's schedule permits such course.

It is not conceded by respondent, however, that the instant case will control the disposition of the *Marcello* case, (No. 145, O.T. 1954). The *Marcello* case involves undenied allegations of prejudgment. Here the allegations were disputed. Factual issues are determined by the proofs adduced in individual cases. In addition, the *Marcello* case involves the important issue of the application of the Administrative Procedure Act to deportation hearings. If the Marcello hearing be declared invalid on that ground, the issue here presented may not be reached. Finally, we do not believe that the instant case will affect a substantial number of cases: *First*, because each case must be decided on its facts; *Secondly*, as the Government is well aware

many persons within the program have already been deported (Michael Spinella, Vincenzo Carrollo, and Jaspare Matranga are three such individuals); *Thirdly*, several within the program have been declared nondeportable by the courts on other grounds, *Savoretti* v. *U.S. ex rel. Pincus*, 214 F. 2d 314 (C.A. 5, 1954); *Savoretti* v. *Voiler*, 214 F. 2d 425 (C.A. 5, 1954); *Fourthly*, the program as revealed by the instant record merely involved some one hundred persons including American citizens; and *finally*, the program has now been discontinued. It is therefore our considered judgment that not more than one or two dozen cases are outstanding which will be affected by the instant decision.

(D) *Basis for denying Supreme Court review herein.*

1. It is the practice of this Court by denying certiorari to leave undisturbed, decisions of Courts of Appeal involving solely a fair assessment of factual issues. The Supreme Court "is not the place to review a conflict of evidence" nor to reverse a Court of Appeals because the record is found "tilting one way rather than the other, though fair minded judges could find it tilting either way," *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 at pp. 502-503 (1951). Review is denied in this Court where "conclusions of circuit courts of appeal depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commision* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927). The opinions below demonstrate that such is the case here. Review is here sought of factual issues which have been resolved in respondent's favor on issues as to whether the Attorney General's program was one to deport or expedite cases, whether the Board of Immigration Appeals was aware of such program and influenced by it. There is no occasion for this Court to further review these issues of fact.

2. The standard applied by the Court of Appeals in giving

controlling weight to contemporaneous documentary evidence submitted by respondent and in reversing clearly erroneous findings for petitioner in the District Court, conformed to the principles announced by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947). The dissenting opinion differed on the result herein, but acknowledged that this was the proper standard. Review is, therefore, not warranted to correct the application of standards of review by the Court of Appeals herein.

3. The majority opinion correctly interpreted this Court's previous ruling in the instant case. The Government had submitted the full text of press releases and public statements by various officials of the Department of Justice (R. 147a). This Court concluded that these "announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport," 347 U.S. at 267. Additional evidence and documentary proof were submitted below to reinforce this conclusion. The Court of Appeals properly relied upon the contemporaneous documentary evidence, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947), Mr. McGranery's testimony (R. 136a *et seq.*), and this Court's interpretation of the Attorney General's Program. The evidence warrants no other conclusion.

4. The factual basis alleged in defense herein was threefold. *First*, it was alleged that the program was in fact one merely to expedite cases. For the reasons noted above that theory may not be upheld. *Secondly*, it was asserted that the Board was not aware of the fact that Accardi had been included therein. The District Court rejected that contention and it may not be raised at this time since the petitioner did not cross-appeal to the Court of Appeals on this issue. Moreover, as noted by the Court of Appeals

(Pet. App. 7a), this rejection finds support in the record. *Thirdly*, it was contended that the Board was not influenced by the program because it believed the program to be one to expedite consideration of cases. We have shown in paragraph B, *supra*, that this contention flies in the face of the only rational interpretation reasonable individuals might have who read the contemporaneous documentary accounts of the program. The Board members acknowledged that their sole source of information at the time were these documentary accounts.

Rejection of these defenses leaves no alternative but to find that the program was one to deport and that the Board was aware of a direction to deport Accardi from the Attorney General. This is then rounded out by a Department of Justice announcement of April 3, 1953, that Accardi was actually ordered deported pursuant to the program (R. 149a). The evidence, therefore, clearly supports the charges in the habeas corpus application. Further review of these factual issues by this Court is not appropriate since the Court below properly evaluated the evidence herein.

Conclusion

The issues of fact presented herein do not merit the discretionary review accorded by a writ of certiorari. Moreover, in view of the fact that the result reached below is amply supported by documentary and other evidence, the petition herein should be denied.

Respectfully submitted,

JACK WASSERMAN,
Attorney for Respondent,
Warner Building,
Washington 4, D. C.